

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

LAZ PARKING MID ATLANTIC, LLC,
D/B/A LT TRANSPORTATION

Employer

and

Case 05-RC-279327

AMALGAMATED TRANSIT UNION,
AFL-CIO/CLC¹

Petitioner

DECISION AND DIRECTION OF ELECTION

LAZ Parking Mid Atlantic, LLC, d/b/a LT Transportation (the Employer) is engaged in providing passenger transportation services within the District of Columbia. The Amalgamated Transit Union, AFL-CIO/CLC (the Petitioner), filed the instant petition with the National Labor Relations Board (Board) under Section 9(c) of the National Labor Relations Act (Act), seeking to represent the approximately 60 employees in the following unit that the parties stipulated was appropriate: all full-time and regular part-time shuttle drivers working at or out of the facility currently located at 66 New York Avenue, NE, Washington, DC 20002, but excluding all other employees, managerial employees, guards, and supervisors as defined by the Act.² The parties

¹ The parties stipulated to amend the formal documents to correctly reflect the names of the parties as identified herein.

² The parties stipulated, and I find, that this proposed unit is an appropriate unit within the meaning of Section 9(b) of the Act.

further stipulated that there is no collective-bargaining history regarding the petitioned-for unit and there is no contract bar precluding the processing of the instant petition.

The sole issue in this proceeding is whether, in light of the continuing COVID-19 pandemic, the Region should conduct the election manually or by mail ballot.³ The Petitioner asserts the election should be conducted by mail ballot to ensure the safety of employees and other participants, while the Employer seeks a manual election, contending the election can be conducted safely and a manual election is in accordance with the Board's longstanding preference.

A hearing officer of the Board heard this case by videoconference on July 22, 2021,⁴ during which the parties entered into several stipulations.⁵ The parties were advised that the

³ Throughout this decision, the terms "COVID-19," "COVID," and pandemic are used interchangeably.

⁴ All dates are in 2021 unless otherwise noted.

⁵ Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated the undersigned its authority in this proceeding. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings, made at the hearing, are free from prejudicial error and are hereby affirmed, unless otherwise noted herein.
2. The parties stipulated, and I find, that the Employer is a limited liability company with an office and place of business in Washington, D.C., and is engaged in the business of providing passenger transportation services within the District of Columbia. During the 12-month period ending June 30, 2021, the Employer has conducted its business operations, described above, in Washington, D.C., and the Board asserts plenary jurisdiction over enterprises in Washington, D.C.
3. I further find, as also stipulated by the parties, that the Employer is engaged in commerce within the meaning of Section 2(6), and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
4. The parties additionally stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

determination over the method of election would not be litigated.⁶ Notwithstanding, the parties were afforded an opportunity to present evidence regarding the appropriateness and feasibility of conducting a manual election during this pandemic. Both parties filed post-hearing briefs. Based on the entire record and in consideration of the parties' arguments, post-hearing briefs, and relevant Board law and COVID-19 data, for the following reasons, I am directing a mail ballot election.

Procedural Issue

Before turning to the facts and substantive issue before me, I will address a procedural matter. The Petitioner, relying on Section 102.66(d) of the Board's Rules and Regulations, argued at hearing and in its post-hearing brief that the Employer should be precluded from presenting evidence and argument supporting its position that the election be conducted manually because the Employer untimely served its statement of position on the Petitioner. The Petitioner similarly filed a motion to strike the Employer's brief, apart from those portions addressing the Board's jurisdiction or the appropriateness of preclusion. In this connection, an employer in an RC case is obligated to file with the Regional Director and serve on the other parties named in the petition its statement of position by noon 8 business days following the issuance and service of the Notice of Hearing. R&R 102.63(b)(1). The Employer, because of a typographical error in the service e-mail address, failed to meet this deadline.

⁶ The determination over the method of election is within the discretion of the Regional Director, and therefore, it was not a subject of litigation at hearing. NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11128 and Section 11301.2 (Casehandling Manual).

The Employer opposed the Petitioner's preclusion requests at hearing and by its response to the Petitioner's motion to strike. It also requested that the exhibits it presented (Rejected Exh.2) be accepted by the Regional Director.⁷ I have considered the arguments presented by the parties and reviewed the relevant Board law and find that the Employer's arguments, offers of proof, and evidence presented at hearing, and its post-hearing brief, should not be struck or precluded.

Section 102.66(d) of the Board's Rules and Regulations provides that, "[a] *party* shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its *timely* Statement of Position or to place in dispute in response to another party's Statement of Position..." (emphasis added). As noted earlier, to be considered timely under Section 102.63(b)(1), the statement of position must be filed with the Regional Director and served upon the parties by noon 8 business days following issuance and service of the Notice of Hearing. Section 102.66 (b) further provides, "The hearing officer shall not receive evidence concerning any issue as to which parties have not taken adverse positions, except that this provision shall not preclude the receipt of evidence regarding the Board's jurisdiction over the employer or limit the regional director's discretion to direct the receipt of evidence concerning any issue, such as the appropriateness of the

⁷ At hearing, the Petitioner objected to the receipt of the Employer's statement of position (Rejected Exh. 1) and to documents related to the propriety of a manual election (Rejected Exh. 2). The Hearing Officer placed both in the rejected exhibits file.

proposed unit, as to which the regional director determines that that record evidence is necessary.”

It is evident that the Board Rules authorizes a regional director to direct the receipt of evidence concerning any issue for which that regional director determines that record evidence is necessary. Indeed, the Board held, in *Brunswick Bowling Products, LLC*, 364 NLRB No. 96 (2016), that this preclusion provision limits only the “defaulting ‘party’ from raising an issue it was required to but failed to timely raise. The rule does not, however, preclude any other party from raising an issue, nor does it preclude the regional director from addressing an issue. It is also clear from the context of the provision within the structure of the Act and the Rules, including Section 102.66(b), which authorizes the regional director the receipt of evidence concerning any issue as to which she determines the record evidence is necessary.” *Brunswick*, 364 NLRB slip op at 4; see also, *IKEA Distribution Services, Inc.*, 370 NLRB No. 109 (2021).

Additionally, here, I find the Petitioner’s preclusion arguments are without merit in light of the fact that the determination over the method and mechanics of an election rests within my discretion and the issue over whether this election should be manual or by mail ballot is not an issue subject to litigation. Indeed, Board Rule § 102.66(g)(1) *requires* that prior to the close of the hearing, the Hearing Officer will “[s]olicit the parties’ positions on the type, date(s), time(s), and location(s) of the election and the eligibility period, but shall not permit litigation of those issues.” Thus, I consider that precluding arguments, evidence, and briefs related to a non-litigable issue, is wholly unsuitable, especially in the present pandemic

environment as it relates to the manner by which an election is held. Based on the foregoing, I reject the Petitioner's preclusion requests and motions.⁸ Moreover, I consider them to be moot, given my independent obligation to investigate the circumstances of conducting an election.

Facts

The Employer's facility and Proposed Manual Election Arrangements:

The employees the Petitioner seeks to represent are shuttle drivers who transport employees of Children's National Hospital and Medstar Washington Hospital Center, and occasionally its patients. During transport, drivers and passengers are required to be masked. The Employer proposes the election be held in the office trailer, on a Thursday, when most employees are in attendance. The polling area inside the trailer is about 31 feet long and 9 ½ feet wide.⁹ The parties agree that if a manual election is directed, it should be held from 8:30 a.m. to 11:15 a.m. and from 11:45 a.m. to 3:30 p.m., or from noon to 3:30 p.m., if the employees who begin work at noon are allowed to vote while on paid time.

⁸ I specifically adopt the Hearing Officer's ruling to reject the untimely served Statement of Position (See, *Brunswick Bowling Products, LLC*, 364 NLRB No. 96 (2016)). However, regarding Rejected Exh. 2, documents relating to ventilation of the polling space, Employer safety protocols, and other information concerning the appropriateness of a manual election, I find that those may be considered and relied upon in this fact-finding process to determine the method of the election, a non-litigable issue within my discretion.

⁹ The Employer indicates in its brief that the polling area is approximately 39 feet long and nearly 10 feet wide, but the record indicates that the polling area, to the right of the interior door, is 31 feet long and 9½ feet wide. The entire office trailer is about 40 to 44 feet long by 10 feet. (Joint Ex. 2, indicates the trailer is 44 feet, while the transcript reflects 40 feet.)

There are two entrances/exits to the trailer, the trailer is well ventilated, and the Employer maintains that polling area could accommodate the necessary tables for the Board agent, observers, ballot box, and the voting booth; the Employer also maintains that the tables could be stationed six feet apart. It is anticipated that a voter would enter via the trailer's left door, proceed through an interior door to the polling area on the right side of the trailer (the 31-foot x 9½-foot area) and exit through the right-side door. The Board agent could allow one voter to proceed at time, while waiting voters would form a line outside the trailer. The Employer plans to place markings to guide voters where to stand to allow for purposes of social distancing. Additionally, the Employer and the Petitioner will limit themselves to one observer each for the actual polling period. The Employer avers that no release schedule is needed, while the Petitioner posited that one may be necessary for the noon-12:30 time period.

The Employer affirms that it will comply with all the protocols and certifications outlined in *GC Memorandum 20-10*, discussed in greater detail below. The record did not clearly indicate the systems or methodology the Employer utilizes to track employees who have tested positive for, or have been exposed to COVID-19. The Employer acknowledged that there is no defined procedure whereby Children's Hospital and Medstar notify the Employer of any COVID exposure of their employees/patients who have been transported by the Employer. According to the Employer, eight employees have tested positive for COVID since January, and the most recent positive case occurred on about April 26.

Position of the Parties:

The Petitioner seeks a mail ballot election, contending that, although positivity rates may be below 5 percent, the number of cases of COVID-19 in Washington, D.C. and the surrounding counties over the prior two weeks has increased dramatically. It further argues that the polling location is not spacious enough to satisfy the Board's protocols. The Petitioner also questions the Employer's ability to comply with its certification obligations required under *GC Memorandum 20-10* because the hospitals/companies for whom the Employer provides transportation services do not provide COVID related data to the Employer. Moreover, the Petitioner notes that, due to the nature of the employees' work, employees have exposure to hospital employees and sick patients, making a manual election an even greater health risk to those in attendance. In short, the Petitioner argues that a mail ballot election is the best way to ensure participants' safety and increase the likelihood that employees are able to exercise their right to vote.

In contrast, the Employer maintains that a manual election can be conducted safely, that it will and is able to abide by all safety protocols, and that the polling space is sufficient in size to allow for the necessary distancing. Moreover, it argues that, even if the number of newly confirmed cases may be on the uptick, the overall numbers remain low, particularly in light of the history of this pandemic, and the positivity rate is well below five percent. Additionally, the Employer argues that mail ballot elections are not as reliable as in-person elections and that conducting a manual election comports with the Board's long-standing preference for manual elections.

Board Law and Guidance

The Board has held that the mechanics of an election, such as the date, time, and place, are left to the discretion of the Regional Director. *Ceva Logistics U.S., Inc.*, 357 NLRB 628 (2011); *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1366 (1954). In addition, the Board has found that Regional Directors have the discretion to determine whether an election will be conducted manually or by mail ballot. See *Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998); Board's Rules and Regulations Section 102.66(g)(1); NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11228 and Section 11301.2 (the determination over the method of election is not an issue subject to litigation).

It is well established, however, that the Board has a strong preference for conducting manual elections. NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11301.2; *San Diego Gas & Electric*, 325 NLRB 1143 (1998). Yet, it also has a history of conducting elections by mail when necessary. As the Board noted in *London's Farm Dairy, Inc.*, 323 NLRB 1057 (1997), "[f]rom the earliest days of the Act, the Board has permitted eligible voters in appropriate circumstances to cast their ballots by mail."

In response to the evolving realities of the pandemic, on July 6, 2020, then-General Counsel Peter Robb issued *Memorandum GC 20-10*, "Suggested Manual Election Protocols." This memorandum contains ten specific protocols to be addressed in any Stipulated Election Agreement or Decision and Direction of Election in which a manual election is to be conducted:

A. Spacious polling area, sufficient to accommodate six-foot distancing, which should be marked on the floor with tape to insure separation for observers, Board agent, and voters.

B. Separate entrance and exit for voters, with markings to depict safe traffic flow throughout polling area.

C. Separate tables spaced six feet apart so Board agent, observers, ballot booth and ballot box are at least six feet apart.

D. The Employer will provide markings on the floor to remind/enforce social distancing.

E. The Employer will provide sufficient disposable pencils without erasers for each voter to mark their ballot.

F. The Employer will provide glue sticks or tape to seal challenged ballot envelopes.

G. The Employer will provide plexiglass barriers of sufficient size to protect the observers and Board agent to separate observers and the Board agent from voters and each other, pre-election conference and ballot count attendees, as well as masks, hand sanitizer, gloves and wipes for observers.

H. The Agency will provide to the Board agent(s) running the election a face shield, mask, disposable clothes covering if requested, hand sanitizer, gloves and disinfecting wipes.

I. An inspection of the polling area will be conducted by video conference at least 24 hours prior to the election so that the Board agent and parties can view the polling area.

J. In accordance with CDC guidance, all voters, observers, party representatives, and other participants should wear CDC-conforming masks in all phases of the election, including the pre-election conference, in the polling area or while observing the count. Signs will be posted in or immediately adjacent to the Notice of Election to notify voters, observers, party representatives and other participants of this requirement.

This memorandum also requires an employer's written certification that the polling area is consistently cleaned in conformity with CDC standards as well as a certification of how many individuals have been present in the facility within the preceding 14 days who have tested positive for COVID-19; who have been directed by a medical professional to proceed as if they

have tested positive for COVID-19; who are awaiting results of a COVID-19 test; who are exhibiting symptoms of COVID-19; or who have had direct contact with anyone in the previous 14 days who has tested positive for COVID-19. Also required are written certifications from each party representative and observer participating in the pre-election conference, election and ballot count that within the preceding 14 days, they have not tested positive for COVID-19, are not awaiting the results of a test and have not had direct contact with anyone who has tested positive, is awaiting the results of a test or has been directed by a medical professional to proceed as if they have tested positive. *GC Memorandum 20-10* does not provide an enforcement mechanism for any of its suggestions other than canceling an election, delaying the resolution of the question concerning representation.

Thereafter, the Board, in *Aspirus Keweenaw*, 370 NLRB No. 45 (November 9, 2020), outlined factors to consider when assessing the risk associated with the pandemic and the propriety of a mail-ballot election. In so doing, the Board reaffirmed its longstanding policy favoring manual elections, but identified six situations, the existence of any of which, would suggest the Regional Director should direct a mail-ballot election. Those situations are as follows:

1. The Agency office tasked with conducting the election is operating under “mandatory telework” status;

2. Either the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;

3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;

4. The employer fails or refuses to commit to abide by the General Counsel's protocols for Manual Elections established in GC Memo 20-10;

5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; and/or

6. Other similarly compelling circumstances.

The Board indicated that a Regional Director who exercises discretion to direct a mail-ballot election when one or more of these situations exists will not have abused his or her discretion. *Id.* slip op. at 8.

In view of the criteria set forth by the Board, above, I note that the Regional office responsible for conducting this election is not operating under a mandatory telework status. Moreover, as of May 17, Washington D.C. Mayor Muriel Bowser issued a Mayor's Order (2021-069) lifting previous operational restrictions and capacity limits, effective May 21.¹⁰ The record reflects that there is no current COVID outbreak at the Employer's facility and the Employer will provide the necessary certifications in this regard. Therefore, these factors support conducting a manual election. However, the criteria that the either the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, *or* the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher suggest the propriety of a mail-ballot election in this case.

A review of data for the District of Columbia, where the facility is located, and

¹⁰ I further note that Mayor Bowser issued an Order effective July 31, re-imposing an indoor mask requirement. (Mayor's Order 2021-097).

surrounding counties,¹¹ reflects that although the positivity rate is below 5 percent, the number of 14-day trend of new confirmed COVID-19 cases is on the rise.

In the District of Columbia, the positivity rate is below 5 percent. As of July 30, according to Mayor's website, it was 3.7 percent; according to Johns Hopkins University's website as of August 4, the 7-day moving average positivity rate was 2.8 percent. However, the number of cases over the past 14 days has increased.¹² The chart below reflects the number of new cases over the last 14 days.¹³

-14	-13	-12	-11	-10	-9	-8	-7	-6	-5	-4	-3	-2	-1
34	31	72	43	0	0	187	68	40	61	69	0	0	320

When viewing this data, I am mindful that the District of Columbia is a region that does not report data for some or all of a weekend, accounting for those days reflecting zero reported cases.¹⁴ Thus these data, on the whole, reflect an upward 14-day trend in the number of new confirmed COVID cases.¹⁵ Similarly, while recognizing the difference between the positivity

¹¹ In *Aspirus* the Board held if "some or all of the work force comes from areas outside the county, it may be appropriate to consider data from those other areas." *Aspirus Keweenaw*, 370 NLRB No. 45 slip op. at 6.

¹² See, District of Columbia Mayor's site at, <https://coronavirus.dc.gov/release/coronavirus-data-august-2-2021> showing that as of July 30 the positivity rate was 3.7 percent (last viewed August 4). The rolling 7-day positivity rate for DC as of August 4 was 2.8 percent. See, <https://coronavirus.jhu.edu/testing/tracker/overview>, See also, <https://coronavirus.jhu.edu/region/us/district-of-Columbia>, See also, <https://coronavirus.jhu.edu/testing/testing-positivity>

¹³ See, <https://bao.arcgis.com/covid-19/jhu/county/11001.html> (data as of August 3)

¹⁴ See notes, at <https://coronavirus.jhu.edu/region-data-notes>. Likewise, Virginia does not report information on some or all of the weekend.

¹⁵ See also, <https://coronavirus.jhu.edu/region/us/district-of-columbia> under testing overview, reflecting an upward trend in daily cases in Washington. Although I need not rely on the

rate and the 14-day trend of new cases, the positivity rate in Washington has risen as the number of new cases has gone up - on July 23, the positivity rate was 2.3 percent,¹⁶ but was 1.9 percent on July 16.¹⁷ In short, the COVID-19 data before me, as of this writing, reflects that one of the conditions in *Aspirus* has been met, inasmuch as the 14-day trend in the number of new confirmed cases of COVID-19 in the place where the facility is located is increasing, thus suggesting the propriety of a mail ballot election.

Although the record did not specifically indicate whether some of the Employer's shuttle drivers are from surrounding counties, given the location of the facility and the realities of the greater Washington, D.C. metropolitan area, it is quite likely that such is the case. The Hearing Officer reviewed data from many counties near the District of Columbia. Recent data reflect that in Arlington County, Virginia the positivity rate for the 14-day period from July 17 to July 30 was 2.7 percent, and 1.3 percent for the prior two-week period.¹⁸ Regarding the 14-day trend of new COVID cases, on the first day of this period, July 20 (since this data is as of August 3, the time period covers July 20 through August 2, and is the same period of time reflected in the chart above regarding Washington) there were 15 new cases and there were 75 new cases at the end of

information provided by the New York Times, its tracking information shows a 14-day change of + 120 percent in Washington. See, <https://www.nytimes.com/interactive/2021/us/washington-district-of-columbia-covid-cases.html> (data updated August 4)

¹⁶ See, <https://coronavirus.dc.gov/release/coronavirus-data-july-26-2021>

¹⁷ See, <https://coronavirus.dc.gov/release/coronavirus-data-july-19-2021>

¹⁸ See, <https://www.vdh.virginia.gov/coronavirus/health-professionals/virginia-long-term-care-task-force/covid-19-in-virginia-pcr-positivity-rates/> (last viewed August 4, data updated August 2)

this 14-day period.¹⁹ In Fairfax County, Virginia, the positivity rate for the period of July 17 to July 30 was 3.2 percent, and for the previous 14-day period it was 1.3 percent.²⁰ Looking at the 14-day trend of new confirmed cases, on July 20 (-14), there were 43 new COVID cases, and on August 2 (-1), there were 316 new cases; and on 9 of those days within that period there were over 43 new cases reported.²¹ In Loudoun County, Virginia, the positivity rate for July 17 to July 30 was 3.9 percent, and 1.4 percent for the prior two week period.²² There were 59 new cases on July 20, and as of August 2, there were 128 new cases; however, between those dates there was only one day with an excess of 59 new cases.²³ Looking at other areas in Virginia, I note that the positivity rate for the period of July 17 to July 30 for Alexandria, Virginia was 4.2 percent, and 1.9 percent the prior two-week period; in Prince William County, it was 4.2 percent for the period of July 17 to July 30, and 2.3 percent the prior two-week period. See, <https://www.vdh.virginia.gov/coronavirus/health-professionals/virginia-long-term-care-task-force/covid-19-in-virginia-pcr-positivity-rates/>. Also, the number of new cases in Alexandria on July 21 was 6, and as on August 3 was 21; on 8 days in between those two dates, over 6 cases were reported, reflecting an increase over the 14-day period. See, <https://bao.arcgis.com/covid->

¹⁹ See, <https://bao.arcgis.com/covid-19/jhu/county/51013.html> (data as of August 3)

²⁰ See, <https://www.vdh.virginia.gov/coronavirus/health-professionals/virginia-long-term-care-task-force/covid-19-in-virginia-pcr-positivity-rates/> (last viewed August 4, data updated August 2)

²¹ See, <https://bao.arcgis.com/covid-19/jhu/county/51059.html> (data as of August 3)

²² See, <https://www.vdh.virginia.gov/coronavirus/health-professionals/virginia-long-term-care-task-force/covid-19-in-virginia-pcr-positivity-rates/> (last viewed August 4, data updated August 2)

²³ See, <https://bao.arcgis.com/covid-19/jhu/county/51107.html> (data as of August 3)

19/jhu/county/51510.html (data as of August 4). Finally, in Prince William County, as of July 21, there were 51 new COVID cases and 63 new cases on August 3, and only on three dates in between were there in excess of 51 cases. See, <https://bao.arcgis.com/covid-19/jhu/county/51153.html> (data as of August 4)

Turning to Maryland, in Montgomery County, the 7-day rolling average positivity rate is 2.37 percent,²⁴ and the number of new confirmed cases is on the rise. In this regard, on July 20, there were 19 new cases; every day since then, the number of new cases has exceeded 19.²⁵ In Prince George's County, the 7-day rolling average positivity rate is 4.4 percent;²⁶ there were 28 new cases on July 20, and 100 new cases as of August 2, and on all days in between there were over 28 new cases reported.²⁷ In Anne Arundel County, the rolling average positivity rate is 3.95 percent;²⁸ on July 20, there were 12 new cases, on August 2, there were 39 new cases, and on every day within that 14-day period, there were in excess of 12 new cases, reflecting an upward trend in new COVID cases.²⁹

The foregoing data reflect that, for these surrounding counties, the positivity rates remain below 5 percent, but there is an increase in the 14-day trend in the number of new confirmed

²⁴ See, <https://coronavirus.maryland.gov/datasets/mdcovid19-pospercentbyjursidiction/explore> (data as August 3)

²⁵ See, <https://bao.arcgis.com/covid-19/jhu/county/24031.html> (data as of August 3)

²⁶ See, <https://coronavirus.maryland.gov/datasets/mdcovid19-pospercentbyjursidiction/explore> (data last updated August 3)

²⁷ See, <https://bao.arcgis.com/covid-19/jhu/county/24033.html> (data as of August 3)

²⁸ See, <https://coronavirus.maryland.gov/datasets/mdcovid19-pospercentbyjursidiction/explore> (data last updated August 3)

²⁹ See, <https://bao.arcgis.com/covid-19/jhu/county/24003.html> (data as of August 3).

cases.³⁰ Accordingly, I conclude that the increase in 14-day trend of new COVID cases in Washington D.C. alone warrants directing a mail ballot election, and the upward trend in some of the surrounding counties further supports this finding.

As mentioned previously, the Petitioner expressed doubts that the Employer can comply with *GC Memorandum 20-10* protocols regarding the necessary certifications and the spaciousness of the polling area. The Employer has given assurances it will comply with all necessary certifications. I am aware the Employer's "facility" is the office trailer, but given the nature of the work of the petitioned-for unit employees, I would expect the majority of their days are spent inside the shuttles they operate. Consequently, it would seem logical that the "facility" for purposes of COVID exposure certifications should include those shuttles. The Employer correctly points out that simply living life exposes employees to potential COVID-positive persons and such exposures may not be captured in any certification. However, it seems a certification regarding COVID for persons at the Employer's facility over 14 days preceding the election is rendered meaningless if shuttles, where employees engage in their work duties, are

³⁰ Although I do not rely on the following in reaching my decision, this upward trend is also reflected in tracking information provided by the New York Times. See, <https://www.nytimes.com/interactive/2021/us/arlington-virginia-covid-cases.html> showing a 14-day change of +295 percent in Arlington County, Virginia; see, <https://www.nytimes.com/interactive/2021/us/fairfax-virginia-covid-cases.html> showing a 14-day change of +144 percent in Fairfax County, Virginia; See, <https://www.nytimes.com/interactive/2021/us/loudoun-virginia-covid-cases.html> showing a 14-day change of +98 percent in Loudon County, Virginia; See, <https://www.nytimes.com/interactive/2021/us/montgomery-maryland-covid-cases.html> showing a 14-day change +177 percent in Montgomery County, Maryland; See, <https://www.nytimes.com/interactive/2021/us/prince-george-s-maryland-covid-cases.html> showing a 14-day change of + 155 percent in Prince George's County, Maryland; See, <https://www.nytimes.com/interactive/2021/us/anne-arundel-maryland-covid-cases.html> showing a 14-day change of +212 percent in Anne Arundel County, Maryland (Data As of August 3, that is the last day of new cases included in the reporting was August 3.)

not considered a “facility.” Since there is no notification procedure between the hospitals and the Employer, the Employer would be unable to accurately certify the information regarding COVID. The Employer has affirmed that it will comply with the certification obligations, and I have no reason to believe it will not undertake this obligation in good faith and to the best of its ability. However, I have reservations about how complete and accurate those certifications would ultimately be, given the Employer’s lack of basis of knowledge for the multitude of individuals that the petitioned-for employees come into contact with due to the nature of the unit employees’ work driving shuttle buses with employees and patients of two medical facilities. Accordingly, I find that this factor further supports the propriety of a mail ballot election.

Additionally, the Petitioner contends the polling area is a limited space and may not allow for the distancing requirements detailed in *GC Memorandum 20-10*. Although it could be accomplished, there is no doubt having six feet of distance between reasonably sized tables for the Board agent, two observers, with room for them to sit, a ballot box, and a voting booth (that must be private, facing a wall rather than the room) in this 31 x 9½-foot space would be challenging. In light of the small polling area and distancing requirements mandated by *GC Memorandum 20-10*, only one voter could be in the polling area at a time.³¹ Nevertheless, although it may not be “spacious” as contemplated by the General Counsel in *GC Memorandum 20-10*, I do not believe that the size of the polling area would warrant directing a mail ballot election here, as the Petitioner suggests.

Based on the forgoing law, guidelines, and relevant COVID data, since the 14-day trend

³¹ At some point, a line would likely have to form outside the polling area and another agent may be needed. See Casehandling Manual Sections 11318 and 11326.4 requiring that such a no-electioneering area should not be established beyond the Board agent’s view.

in the number of new confirmed cases of COVID-19 in the place where the facility is located is increasing, as well as in some of the surrounding counties, and to ensure the safety of all participants in an election held during a pandemic which has yet to cease, and compliance with the agency's obligations, I will direct a mail ballot election, consistent with the Board's decision in *Aspirus*.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Amalgamated Transit Union, AFL-CIO/CLC.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. Accordingly, on Thursday, August 12, 2021, at 3:00 p.m., ballots will be mailed to voters by National Labor Relations Board, Region 05, from its office at 100 S. Charles Street, Bank of America Center, Tower II, Ste. 600, Baltimore, MD 21201. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.³²

³² The Employer urged that if a mail ballot election is directed, that the ballots issue by 5:00 p.m., thirty days after the Decision and Direction of Election issues, and requests there be a four-week period between the date the ballots are mailed out and the date they are due, because of the vagaries of the United States Postal Service and to give employees time to notice that they did not receive a ballot, and to notify the Region. The Employer did not proffer any convincing argument for a 30-day lag between the issuance of this decision and the mailing of the ballots, and I find that this much time is unnecessary. As for the time I have provided between the

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Thursday, August 19, 2021, should communicate immediately with the National Labor Relations Board by either calling the Region 05 Office at (410) 962-2822 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

All ballots will be commingled and counted at the Baltimore Regional Office on Thursday, September 9, 2021, at 3:00 p.m. In order to be valid and counted, the returned ballots must be received in the Baltimore Regional Office prior to the counting of the ballots. Due to the extraordinary circumstances of COVID-19 and the directions of state or local authorities, I further direct that the ballot count will take place virtually, on a videoconference platform (such as Zoom, WebEx, Skype, etc.) to be determined by the Regional Director. Each party will be allowed to have one observer attend the virtual ballot count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending Sunday July 25, 2021, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

mailing of the ballots and date the ballots are due and will be counted, I will set that period for four weeks.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by Monday, August 9, 2021. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**³³

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on

³³ The Petitioner has agreed to waive the entire 10-day period it is permitted to receive the voting list prior to the opening of the polling period.

the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-ruleseffective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays,

Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after

issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Baltimore, Maryland this 5th day of August, 2021.

(SEAL)

/s/ *Sean R. Marshall*

Sean R. Marshall, Regional Director
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